

by the Board of Review. In my view, the question does not arise. The comptroller, in making his assessment, is required by section 68 to do so "to the best of his judgment" and there can be no presumption of his failure to do so.

The certificate under section 86(3) sufficed, on the facts of this case, for judgment to be given by the senior assistant registrar. The appeal is dismissed with costs.

Turning now to Civil Suit No. 46 of 1965, the plaintiff had refused to accept the defendant's returns and assessed the defendant for the years of assessment 1962 and 1963 under section 68(2)(b) of the Ordinance. The assessed tax for 1962 was \$9,600 and for 1963 \$14,400. The penalty added under section 91(1) was \$9,600 for 1962, and \$4,800 for 1963, making a total of \$39,600.

It was contended that section 91(1) does not empower the comptroller to impose any penalty because a penalty necessarily postulates an incorrect return; that the question whether a return is incorrect in any way is one for the court to decide; and that, once a taxpayer denies he has made an incorrect return, the question must go before the court and the court only. With respect, I think subsection (1) has been confused with subsection (2). The first imposes a penalty on the taxpayer for an incorrect return "unless he satisfied the comptroller" that the omission, understatement or incorrect information was made or given in good faith. The second plainly relates to prosecutions for the offence of making incorrect returns, where the court has to be satisfied of the defendant's good faith in order that a defendant should be allowed an acquittal.

Secondly, it was argued that as the defendant company had only commenced business in May 1962, its first financial year was from May 1, 1962 to April 30, 1963. The defendant on January 26, 1965, after notices of assessment given, had elected to be assessed under section 31(3)(d) and it was stated that "the tax payable for the assessment years 1962 and 1963 is at present unknown". That, of course, was the reason for assessment being made, by the comptroller "to the best of his judgment" under section 68(2)(b). This unfortunate situation should not have arisen had the defendant kept proper accounts and duly sent in returns, in which case there would have been no call for any assessment to be made. As to the question of election, I agree with the plaintiff's submission that section 31(3)(d) has no effect on an assessment raised for the first year of assessment in respect of a new source of income, which is the year of assessment 1962, pursuant to section 31(3)(a). I further agree that section 31(3)(d) applies only to determine the second and third years of assessment taken together and does not have the

A effect of offering any obstacle to tax collection.

The grounds raised by the defence having reference to section 82 and the proviso to subsection (2) of section 73, have been dealt with and do not need repetition.

B Again, the certificate issued under section 86(3) is sufficient for present purposes and I would enter judgment for the plaintiff as prayed. I make no special order for costs on the counterclaim, which was withdrawn.

*Judgment for the plaintiff.*

C

**MAT BIN LIM & ANOR. v. HO YUT KAM & ANOR.**

[O.C.J. (Raja Azlan Shah J.) July 15, 1966]

[Raub — Civil Suit No. 37 of 1965]

D

*Practice and Procedure — Pleadings — Application to strike out statement of claim — Limitation — Acknowledgment of liability — Not pleaded in statement of claim — Civil Law Ordinance, 1956, s. 8(3) — R.S.C., 1957, O. 25, r. 4.*

E The plaintiffs brought an action to recover damages for personal injuries in respect of a road accident. The defendants in their defence pleaded that the plaintiff's claim was barred by limitation by virtue of section 8(3) of the Civil Law Ordinance, 1956. In their reply, the plaintiffs alleged that there had been an acknowledgment of liability. The defendants applied for the plaintiffs' statement of claim to be struck out on the ground that it disclosed no reasonable cause of action.

F **Held:** the acknowledgment should have been pleaded in the statement of claim and as this was not done, the application for the statement of claim to be struck out must be allowed.

*Cases referred to:—*

(1) *Kuan Hip Peng v. Yap Yin & Anor.* [1965] 1 M.L.J. 252, at p. 255.

(2) *Lubovsky v. Snelling* [1944] 1 K.B. 44, 47.

(3) *Cohen v. Snelling* [1943] 2 All E.R. 577.

G

**CIVIL SUIT.**

*Harbans Singh Sidhu* for the plaintiffs.

*R. Talalla* for the defendants.

*Cur. Adv. Vult.*

H

**Raja Azlan Shah J.:** This is an application by the defendants by way of summons in chambers for an order to strike out the plaintiffs' statement of claim under Order 25 rule 4 of the Rules of the Supreme Court on the ground that it discloses no reasonable cause of action or is frivolous and vexatious and an abuse of the process of the court.

I

The points for determination are these. Firstly, when a plaintiff who is seeking by action to recover damages for personal injuries in respect of a road accident relies upon an acknowledgment of liability by the insurance company, does that acknowledgment constitute

in itself a cause of action which is different from that which gave rise to the original claim? Secondly, should such a plaintiff plead the acknowledgment in his statement of claim or should he wait until the defendant pleads limitation and then deliver a reply setting up the plea of acknowledgment?

These points arise for decision in the following circumstances. The first and second plaintiffs as administrator and co-administratrix of the estates of two deceased persons and as next friends to four infants brought an action for damages for the benefit of the deceaseds' estates under the provisions of section 7 of the Civil Law Ordinance, 1956 and also on behalf of the dependants who have suffered damages caused by the death of the two deceased persons. They filed their writ on 6th October 1965. The defendants are the administrators of the estate of Loke Hon Choong (deceased) who the plaintiffs alleged was responsible for the accident which occurred on 2nd February 1963.

Appearance was duly entered and in paragraph 13 of the statement of defence they contended that the plaintiffs' claim was barred and was not maintainable by virtue of section 8(3) of the Civil Law Ordinance, 1956.

A reply was subsequently filed. The plaintiffs joined issue with the defendants on their defence and in further answer to paragraph 13 of the said defence they pleaded in paragraph 2 of the reply that the defendant could not rely on section 8(3) of the Civil Law Ordinance, 1956, as the China Insurance Co. Ltd. of Kuala Lumpur, Malaya, whose policy covered the deceased Loke Hon Choong as driver, had admitted liability and reached an agreement with the plaintiffs' representative as regards the quantum of damages.

In support of the present application, Mr. R. Talalla, an advocate and solicitor of the High Court, put in an affidavit dated 15th November 1965 in which he deposed that letters of administration of the estate of Loke Hon Choong (deceased) were granted to the defendants on 21st May 1963 and that the grant was extracted on 6th June 1963. In answer to paragraph 2 of the reply he stated that to the best of his knowledge, information and belief the China Insurance Co. Ltd. had neither admitted liability nor reached any agreement with the plaintiffs' representative or any other person as regards the plaintiffs' claim for damages.

On 7th December 1965 Enche Abdullah bin Masood the managing clerk of Messrs Harbans Singh and Kamil, advocates and solicitors, who are acting for the plaintiffs, filed an affidavit in reply. He deposed that on 16th October 1963 he interviewed one Liew Fook Thin, the representative of the China Insurance Co. Ltd. at his Kuala Lumpur office. It was said that the in-

A surance company had admitted liability and settled the matter, but they had not made payment in spite of several reminders.

With regard to the first point, the defendants contended that where the plaintiffs are seeking to recover damages by action for personal injuries in respect of a road accident and rely upon an acknowledgment of liability by the insurance company, such acknowledgment constitutes in itself a cause of action which is different from that which gave rise to the original claim. I desire to make it plain that I am not here expressing any concluded view whether there is such an acknowledgment or not. I am deciding this case on the assumption that there is such an admission of liability. In my judgment, an acknowledgment is tantamount to saying that there is an agreement not to plead the statute of limitation and that constitutes a new cause of action. I find support in this view from a passage of Thomson L.P. in *Kuan Hip Peng v. Yap Yin & Anor.*<sup>(1)</sup> That was a claim for compensation brought by the plaintiff suing by his next friend for loss arising from the death of his father as a result of a road accident under section 7(5) of the Civil Law Ordinance, 1956. The particular passage indicates that where there is an exception to a statute of limitation such as infancy, disability or an acknowledgment, that would constitute a new cause of action. That disposes of the first question.

With regard to the second question, the general rule is that where there are exceptions which will affect the operation of a statute of limitation, a plaintiff need not plead them until the defence of limitation has been raised on the pleadings by the defendant. But this rule is not applicable where the statute is absolute and contains no exceptions. The learned Lord President reviewed a series of authorities on the subject in *Kuan Hip Peng's* case, *supra*. It may well be that case was decided in the light of the provisions of section 7(5) of the Civil Law Ordinance. I am nevertheless of the view that the principle is of general application. Section 8(3) enacts that "no proceedings shall be maintainable unless proceedings against the defendant in respect of that cause of action are taken not later than six months after his personal representative took out representation". An analysis of the section indicates that the terms are absolute and without exception. It runs from the date the personal representative took out representation. In the words of the learned Lord President, "There is no question of infancy or disability or anything of the sort or of acknowledgment. The only way in which the consequences of the section could be avoided would be if there had been some agreement not to plead the statute and this would constitute a new cause of action, (*Lubovsky v. Snelling* <sup>(2)</sup>) and would require to be set out in the statement of

claim." That being the case, the reply must not depart from the statement of claim. In this connection I may as well adopt a passage from the current edition of *Bullen & Leake's* "Precedents and Pleadings" (11th Edn.) at page 694:

"The plaintiff, however, must not set up in his reply a new cause of action which is not raised either on the writ or in the statement of claim; it is provided that 'no pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same'. In other words the reply must not contradict or 'depart' from the statement of claim".

See also 1963 *Annual Practice* at page 561 under the heading "Where Reply Necessary".

The plaintiffs rely on the case of *Cohen v. Snelling*.<sup>(3)</sup> In that case the first action was commenced before the plaintiff had obtained a grant of letters of administration and it was discontinued. A second writ was issued after a grant had been obtained. It was contended by the defendants that the second action was barred by section 3 of the Fatal Accidents Act, 1846, which limits the right of action to the period of one year from the date of the death. That case had proceeded on the basis that liability was admitted and evidence to that effect was led in the course of the hearing at first instance. From that it may logically be inferred that such evidence was based on the pleadings in the statement of claim. To that extent *Snelling's* case can be distinguished from the present.

On these unhappy facts it is therefore plain that the acknowledgment should be pleaded in the statement of claim. I will therefore allow the application with costs.

*Application allowed.*

Solicitors: *Harbans Singh & Kamil; Talalla & Co.*

## SHANGARA SINGH v. PUBLIC PROSECUTOR

[A.Cr.J. (Raja Azlan Shah J.) July 16, 1966]

[K.L. — Criminal Appeal No. 21 of 1966]

*Penal Code, s. 193 — False evidence — Record unsigned as certified copy and undated — Evidence Ordinance, 1950, s. 167.*

This was an appeal against the conviction of the appellant for the offence of giving false evidence. It appeared that the record in the case, in which the appellant was alleged to have made the false statement, was not signed as a certified copy and was not dated.

Held: the record should not have been admitted in evidence and as it was wrongly admitted the conviction must be quashed.

Cases referred to:—

(1) *Mohamed Hanifah v. Public Prosecutor* [1956] M.L.J. 83.

(2) *Wong Kok Keong v. R.* [1955] M.L.J. 13 at p. 15.

## A MAGISTRATE'S CRIMINAL APPEAL.

*Edgar Joseph Jr.* for the appellant.

*Zaitoon binte Othman* (Deputy Public Prosecutor) for the respondent.

Raja Azlan Shah J. (delivering oral judgment): The appellant was charged with an offence under section 193 of the Penal Code and was convicted and sentenced to one day's imprisonment and fined \$500 in default one month's imprisonment.

The charge relates to what the appellant had said at the trial before the president of the sessions court when he stated in evidence that he did not make a statement to the police officer whereas in fact he did make a statement to that officer. The appellant has appealed on a number of grounds but counsel wishes to argue only on ground 3 which reads:

"The learned president ought to have held that the omission on the part of the prosecution to tender in evidence the alleged statement of the appellant to senior inspector Michael Khaw (P.W.7) was fatal to the case for the prosecution".

It was argued that Exh. P3 (i.e. the record in Arrest Case No. 138 of 1964, the case which came before the learned president) should not have been admitted because not only was it not signed as a certificated copy but it was undated as well. I do not think that there is any point in citing any cases in support of counsel's proposition as the principle is firmly established: see *Mohamed Hanifah v. Public Prosecutor* <sup>(1)</sup>

The learned deputy public prosecutor urged upon me to invoke the provisions of section 167 of the Evidence Ordinance and she also cited the case of *Wong Kok Keong v. R.* <sup>(2)</sup> Section 167 clearly states that the improper admission of evidence shall not by itself be a ground for a new trial or reversal of any decision. However, that section is qualified by the proviso that there must be sufficient evidence to justify the decision arrived at by the court below independently of the evidence objected to as being improperly admitted. That was said by Spenser Wilkinson J. in the case cited above:

"In my opinion, therefore, the sole test as to whether or not the judgment of the court below should be reversed or altered on account of the wrongful admission of this certificate is whether or not without that evidence there was sufficient evidence to justify the conviction".

I have no alternative but to allow the appeal. The conviction is quashed, and the fine is to be refunded to the appellant.

*Appeal allowed.*

Solicitors: *Joseph & Son.*